**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

| | |
|---|---|
| SAN DIEGO COMMUNITY COLLEGE DISTRICT,<br><br>Employer,<br><br>and<br><br>SAN DIEGO ADULT EDUCATORS CHAPTER OF LOCAL 4289, CFT, AFT, AFL-CIO,<br><br>and<br><br>AMERICAN FEDERATION OF TEACHERS GUILD, LOCAL 1931, CFT, AFT, AFL-CIO,<br><br>Exclusive Representatives. | Case No. LA-UM-649<br><br>PERB Decision No. 1445<br><br>June 15, 2001 |

Appearances: Liebert Cassidy by Bruce A. Barsook, Attorney, for San Diego Community College District; James M. Gattey, Attorney, for San Diego Adult Educators Chapter of Local 4289, CFT, AFT, AFL-CIO and American Federation of Teachers Guild, Local 1931, CFT, AFT, AFL-CIO.

Before Amador, Baker and Whitehead, Members.

## DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed jointly by the San Diego Adult Educators Chapter of Local 4289, CFT, AFT, AFL-CIO (SDAE) and the American Federation of Teachers Guild, Local 1931, CFT, AFT, AFL-CIO (Guild) to a PERB hearing officer's proposed decision. The hearing officer denied the petition which sought to transfer continuing education counselors from a unit represented by SDAE to a unit represented by the Guild.

After reviewing the entire record in this matter, including the hearing transcript, the proposed decision, and the filings of the parties, the Board reverses the proposed decision of the hearing officer and grants the requested unit modification petition. The Board denies the requested remedy that the continuing education counselors be placed on the salary schedule applicable to counselors currently represented by the Guild.

## PROCEDURAL HISTORY

The SDAE is the exclusive representative of a continuing education faculty unit in the San Diego Community College District (District).[1] The Guild represents the District's college faculty unit.[2]

On February 5, 1999, SDAE and the Guild jointly filed a unit modification petition with PERB.[3] The petition sought to transfer the continuing education counselors from the SDAE unit to the Guild unit.[4]

The District filed a statement opposing the petition on March 1. The District asserted that an insufficient community of interest exists between the continuing education counselors and the college counselors, that the existing unit structure coincides with its organizational

---

[1]The unit, established in 1977, includes all full- and part-time certificated adult faculty, including counselors, teachers-on-special assignment, instructor, coordinator, instructor-special and project leaders.

[2]The unit was established in 1976 and includes all faculty (including counselors) in the District's college program.

[3]All dates herein refer to 1999 unless otherwise noted.

[4]PERB Regulation 32781(c) provides (PERB regs. are codified at Cal. Code of Regs., tit. 8, sec. 31001 et seq):

> (c) All affected recognized or certified employee organizations may jointly file with the regional office a petition to transfer classifications or positions from one represented established unit to another.

structure, and that there have been no changes to warrant disruption of the long standing bargaining units.

After a June 3, informal settlement conference failed to resolve the matter, a formal hearing was held on August 31 and September 1. Briefs were filed and the dispute was submitted for decision on October 18. A proposed decision denying the petition was issued on March 9, 2000. Both SDAE and the Guild filed exceptions to the proposed decision and the District responded.

## BACKGROUND

The Board finds the findings of fact of the hearing officer to be free of prejudicial error with one exception. The hearing officer found that "No evidence was presented regarding any dissatisfaction with SDAE on the part of the counselors it represents." As will be discussed below, this finding of fact is reversed. The remainder of the hearing officer's findings of fact, listed below, are hereby adopted as the findings of the Board.

The District provides educational programs ranging from basic skills education through sophomore level college degree programs. College counselors provide services to students at three fully accredited college sites: San Diego City College, Mesa College and Miramar College. Continuing education counselors provide services to students throughout the community and at six major continuing education sites, the largest of which is the Educational Cultural Complex (ECC).

There are approximately 46,000 students in the college program and 54,000 in the continuing education program. Of the approximately 1,859 employees in the college faculty unit, 55 are contract (full-time) counselors and 49 are adjunct (part-time) counselors. Of the approximately 754 members of the continuing education bargaining unit, 29 are contract counselors and 4 are adjunct counselors.

The District's personnel manual contains one class description for "Counselor, College/Continuing Education", and no distinction is made between the credential, knowledge, skills, training or experience required for either type of counselor. Once hired, no specialized training is given to either continuing education or college counselors based on their assignment. Nevertheless, it is the District's practice to require continuing education counselors who wish to become college counselors to go through the regular hiring process.[5]

The working conditions of the continuing education and college counselors are governed by the contracts covering them.

At the time of the hearing, the most recent SDAE contract had expired June 30, 1999, and the current Guild contract expires June 30, 2001. Both groups of counselors work a 40 hour work week. College counselors may work five of those hours off campus, and continuing education counselors may negotiate an on/off campus ratio with their dean. The two groups of counselors are paid on separate salary schedules. The District receives more state funding for the college counselors and they are paid at a higher rate.

As noted above, college and continuing education counselors work at different sites. College counselors generally report to student services administrators at their colleges; continuing education counselors report to deans at their sites.

Contract college counselors attend weekly Counseling Faculty Department meetings; adjunct college counselors and all continuing education counselors are excluded from these meetings. Continuing education counselors have their own professional organization, the San Diego Adult Personnel and Guidance Association (Association), which holds monthly

[5]An exception to this practice occurred in 1993, when the District waived its hiring practice to transfer continuing education counselor Vincent Ceccacci to a college counselor position in order to avoid a layoff.

meetings. While the Association is open to other counselors, it is comprised primarily of continuing education personnel. Continuing education counselors attend two biannual conferences put on by the Association, which are also attended by some college counselors.

Larry Brown, vice president of student services at San Diego City College, testified that college counselors attend in-service trainings not attended by continuing education counselors. There was no testimony regarding the content of these trainings.

The two groups do not interact on a regular basis. It is not uncommon, however, for continuing education counselors to concurrently work as adjunct college counselors, and there are at least three counselors who are doing so currently. John Sullivan, who has worked for the District in both capacities since 1976, testified that he earns approximately 45 percent of his income as an adjunct college counselor.

Continuing education and college counselors provide educational planning, career planning and personal counseling to continuing education and college students. Much of the testimony at the hearing focused on the difference between these two groups of students, specifically, the academic and non-academic nature of their classes, their goals (i.e., college credit, high school degree or the attainment of basic skills), and whether these differences require distinct skills on the part of the counselors serving them.

College students generally require assistance in planning the courses they need to attain their educational goal, be it a two-year college degree or transfer to a four-year college or university. College counselors use the District's computerized educational plan[6] to assist them in this task, as well as English, English as a second language, and math assessment tests.

[6]Only college counselors typically have access to the computerized educational plan. However, at least three continuing education counselors currently have the password to the program.

Continuing education students need assistance in planning which courses to take relating to basic living skills development, vocational goals and/or the attainment of a high school degree. The District offers these courses through nine programs: adult basic education, citizenship, short-term vocational programs, parenting, disabled, older adult, consumer education, English as a second language, and health and safety.

While continuing education counselors do not typically use the computerized educational plans to assist their students, they do use an English as a second language assessment test and the Test for Adult Basic Education, which assesses grade levels in reading and math.

College credit is given for some continuing education classes offered at ECC. Among these are 4 of the 29 vocational education courses: auto mechanics, machine shop, electronics technician and office systems (upon approval).

It is not uncommon for a student to be concurrently enrolled in college and continuing education programs. Continuing education counselors testified that they do not ask a student in which program s/he is enrolled when asked for assistance. Nor do they typically refer a student to a college counselor if his/her questions relate to that program.

College and continuing education faculty (including counselors) have been represented in different units since 1976-77. Since that time, 16 contracts have been negotiated for the continuing education unit and 11 contracts have been negotiated for the college unit. Continuing education counselors' working conditions have regularly been addressed through SDAE negotiations. Continuing education counselors have participated on the SDAE bargaining team and have held elected office in the organization.

Assistant Chancellor for Human Resources Wayne Murphy testified that he would need to add a continuing education administrator to the District's bargaining team for negotiations

with the Guild unit if the unit modification petition were granted. In addition, continuing education administrators would be required to become familiar with the Guild contract.

## DISCUSSION

### Unit Modification Petitions

In each unit determination case, the Board is bound to follow the criteria set forth in section 3545(a) of the Educational Employment Relations Act (EERA)[7].

> In each case where the appropriateness of the unit is an issue, the board shall decide the question on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district.

The issue before the Board is whether the addition of continuing education counselors to the college faculty unit would create an appropriate unit in light of the criteria listed in Section 3545(a).

In Sweetwater Union High School District (1976) EERB Decision No. 4 (Sweetwater)[8], the Board referenced the statement of legislative intent contained in EERA section 3540[9] in holding that:

---

[7] EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

[8] Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

[9] The relevant portion of section 3540 quoted by the Board in Sweetwater reads as follows:

> It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by the organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit.

> Implicit in this statement of legislative intention is the notion that the employees will have the ability to choose an organization which is an effective representative. An effective representative will generally be one largely determined by the community of interest and established practices of the employees rather than the efficient operation of the school district. [Id. at p. 12.]

The Board ruled early in its history that it must in each case determine the "appropriateness" of a unit without being limited only to a choice between "an" or the "most" appropriate unit, and must in each case weigh and balance the statutory criteria in order to achieve consistency of application and the general objectives of EERA. (Antioch Unified School District (1977) EERB Decision No. 37.)

In this case, the current unit configuration, voluntarily established by the parties, does not coincide with PERB decisions, but separates college counselors and faculty from continuing education counselors and faculty into two units. These units are not presumptively appropriate, nor would they become so if the instant unit modification petition were granted. Therefore, in this case, the standard against which the requested unit modification is judged is whether the proposed unit is an appropriate unit. (Long Beach Community College District (1999) PERB Decision No. 1315.)

Community of Interest

To determine whether a community of interest exists among employees, the Board considers the following criteria: method of compensation, wages, hours, employment benefits, supervision, qualifications, training and skills, contact and interchange with other employees. (Office of Santa Clara County Superintendent of Schools (1978) PERB Decision No. 59.) Also to be considered is job function. (Rio Hondo Community College District (1979) PERB

Decision No. 87.) In considering community of interest, PERB eschews the use of a checklist approach and instead considers the totality of circumstances. (Monterey Peninsula Community College District (1978) PERB Decision No. 76.) The point of the inquiry is whether employees share substantial mutual interests. (Id.)

The Board agrees with the hearing officer's conclusion that the evidence shows that the two groups of counselors perform substantially the same kind of work, i.e., providing guidance and information to students regardless of whether they are enrolled in college or continuing education programs. The counseling skills needed to serve the students are also similar. This is evidenced by testimony that the counselors receive no special training to move from a position as a continuing education counselor to one as a college counselor beyond task-specific on-the-job training, such as learning the computerized educational plan. The Board concurs with the hearing officer's finding that the record amply supports the notion that "a counselor is a counselor is a counselor." The record also supports a finding that there is a much greater similarity between the work performed by continuing education and college counselors than between the counselors and the faculty members in their respective units.

All counselors are subject to the same hiring procedures and must possess the same minimum requirements. They work the same hours, although five of those hours may be on or off campus, depending on their unit.

There are also differences between the two groups of counselors, among which are their work sites and lines of supervision. Interaction between the two groups is infrequent, except for that which occurs by virtue of the continuing education counselors working as adjunct

college counselors. In these areas, the continuing education counselors have more in common with the adult education faculty than with college counselors and faculty.

The continuing education and college counselors are paid at different rates on separate salary schedules, as reflected in their contracts. The Board has held, however, that disparities between wage rates and benefits are not enough, standing alone, to establish a lack of community of interest, since they are negotiable items. (Redwood City Elementary School District (1979) PERB Decision No. 107.)

Based upon the record, the Board weighs the similarity in work performed more heavily than the other community of interest factors. Considering the "totality of circumstances" contained in the record, the Board finds that the continuing education counselors share a greater community of interest with the college counselors than with the continuing education faculty, therefore inclusion in the same unit as the college counselors is appropriate.

Negotiating History

Although the record reflects evidence of a 23 year stable negotiating history, in this case the hearing officer afforded too much deference to the negotiating history, allowing it to "tip the scale" in favor of dismissing the petition.

The Board has recognized that negotiating history must be considered, along with other Section 3545 criteria, as an important factor in evaluating a severance request. While a stable negotiating relationship will not be lightly disturbed, negotiating history is but one of several criteria looked to by the Board. (Livermore Valley Joint Unified School District (1981) PERB Decision No. 165 (Livermore).) This same standard applies in evaluating the units proposed in the instant unit modification petition. However, the Board has also made it clear that where the existing wall-to-wall unit was established by voluntary agreement and its appropriateness

was not fully litigated before PERB, the negotiating history will not be granted the same deference. (Id.)

It is acknowledged that in Livermore, the Board was faced with a negotiating history that was only four years old and that in this case, the history dates back to 1976. However, in evaluating the "totality of the circumstances" in this case, slight degrees of weighing evidence differently can be determinative. The fact that the wall-to-wall unit from which the joint petitioners seek to remove the continuing education counselors from was voluntarily established and not fully litigated before PERB negates at least a portion of the deference it would otherwise be afforded. (Id.) Unlike the hearing officer, the Board does not rely on the negotiating history to "tip the scale" in favor of dismissing the petition.

No Evidence of Dissatisfaction

The hearing officer relied heavily on the fact that "no evidence of dissatisfaction" was introduced in the record. The Board finds the fact that the SDAE and the Guild jointly petitioned for the unit modification pursuant to PERB Regulation 32781(c) on its face allows for an inference of dissatisfaction.

It is also apparent that 20 of 30 counselors voluntarily submitted cards in support of the Guild. The District correctly argues that the cards are not part of the record. Counsel for SDAE and the Guild referenced the cards in his opening statement at the hearing, which states:

> It's not a question of support. As part of the record, the official record in this [sic] there are 20 indications of support on the part of the continuing education counselors.

Despite this assertion by counsel, the cards were not made a part of the record. A review of the entire record reveals the cards were mentioned twice in the proceeding before the hearing officer, first in the opening statement as indicated in the above excerpt from the transcript, and a second time in petitioners' post-hearing brief (p. 2, lines 2-5.). In SDAE and the Guild's brief

in support of statement of exceptions, joint petitioners indicate that 20 cards were filed with PERB concurrently with the filing of the petition. Filing the cards with PERB in this manner does not make the cards admissible evidence. PERB Regulation 32300(b) provides that: "[R]eference shall be made in the statement of exceptions only to matters contained in the record of the case." As the 20 cards were not part of the record, the Board could not rely upon them in ruling upon petitioners' exceptions to the proposed decision.

PERB Regulation 32781(e) applies to petitioners' unit modification and provides, in part, that:

> If the petition requests the addition of classifications or positions to an established unit, the Board may require proof of majority support of persons employed in the classifications or positions to be added.

In this case, the hearing officer did not require a proof of majority support. Petitioners knew or should have known that PERB did not issue a determination of majority support.

The finding of dissatisfaction is therefore based upon the fact that the SDAE and the Guild filed a joint request to modify the unit under PERB Regulation 32781(c). Such a filing demonstrates a presumption of dissatisfaction with the status quo. As there is no evidence in the record to rebut this presumption, the record contains adequate evidence of dissatisfaction with SDAE's representation.

Employee Preference

In Grossmont Union High School District (1977) PERB Decision No. 11 (Grossmont), the Board acknowledged that employee preference is a factor to be weighed along with other unit determination criteria. The Board's decision in Grossmont included the following excerpt from a United States Supreme Court decision:

> Naturally, the wishes of employees are a factor in a [National Labor Relations Board] conclusion upon a unit. They are to be weighed with the similarity of working duties and conditions, the character of the various plants and the anticipated effectiveness of the unit in maintaining industrial peace through collective bargaining. (Pittsburgh Plate Glass Co. v. NLRB (1941) 313 US 146, 8 LRRM 425.)

While it is true that EERA does not contain the express "free choice" language that the National Labor Relations Act contains, EERA section 3545 does provide that employees will have the ability to choose an organization which is an effective representative. The danger of a "proliferation of bargaining units" is not present in this case, therefore the prohibitions on "free choice" adopted by the Board in Los Angeles Unified School District (1998) PERB Decision No. 1267 are not relevant here.

In this case, as neither unit would be inappropriate for the continuing education counselors, it is proper to consider the desire of the employees in making a determination. (See Peralta Community College District (1987) PERB Order No. Ad-164.) The filing of a joint petition indicates the affected employees desire the proposed unit modification.

Efficiency of District Operations

There is nothing in the record which legitimately suggests that the unit configuration desired by the petitioners would impair the efficiency of the District's operations. The Board finds that neither having to add a continuing education administrator to the District's bargaining team, nor requiring continuing education administrators to become more familiar with the Guild contract stand as an impediment to granting the joint petition.

Conclusion

In this case, the community of interest factors combined with employee preference properly tip the balance in favor of granting the joint petition. The evidence and application of the criteria listed in EERA section 3545(a) support granting the petition consistent with the

employees' right to choose an effective representative. The Board declines to provide the requested remedy that the continuing education counselors be placed upon the salary schedule applicable to counselors currently represented by the Guild. That is a matter for the Guild and the District to address through the bargaining process.

The dissenting Member intimates that the Board, having reached the above conclusion, appears to be "biased or activist," with a "goal of achieving a policy objective."

Bias is defined as "preference or inclination that inhibits impartial judgment; prejudice." (The American Heritage Dictionary of the English Language, New College Edition.) An implication of bias should not be leveled lightly. In this context, the implication is highly inappropriate. Every member of a Board panel has a right and obligation to vote. Each of those votes should be consistent with what the individual member believes is in the best interest of administering the collective bargaining law at issue. When a case requires a close call on application of the law, as does this case, a dissenting member should accept that his view of administering the law did not prevail.

The dissent asserts that the Board reviews a party's exceptions "[A]s a matter of appellate review," and would require "a showing of prejudicial error in the hearing officer's analysis" before the Board could substitute its judgment for that of the Board agent.

The Board has developed case law wherein the Board grants deference to the credibility determinations of its administrative law judges in recognition of the fact that, by virtue of witnessing the live testimony, they are in a much better position to accurately make such determinations than the Board, which reviews only the cold transcript of the hearing. (Santa Clara Unified School District (1979) PERB Decision No. 104.) The Board does not extend similar deference to conclusions of law. If the Board does not agree with a proposed decision, however minor the disagreement may be, the Board's obligation is to either write its own

decision, clarify the Board agent's decision, or not adopt that portion of the Board agent's decision. On occasion, as here, a different party prevails.

Contrary to the dissenting member's view, "prejudicial error" is not a prerequisite for the Board to act. The dissenting member would afford too much deference to the proposed decision, as indicated by his statement that he sees "no need to substitute [the Board's] judgment for that of the hearing officer." The true danger here would be the "inactive" Board approach advocated by the dissent, wherein proposed decisions would be reviewed with some unarticulated, yet heightened, standard of review. We do not serve as a rubber stamp for our Board agents' decisions, particularly where the decision contains a flawed legal conclusion. Deference does not mean abdication.

As for the final allegation of "achieving a policy objective," the objective of the majority of the Board is the effective and proper administration of EERA, the same objective which should resonate through all Board decisions.

The remainder of the dissent consists of an inquiry into the logic of the decision. The majority decision, applying established case law, weighed: (1) the community of interest factors; (2) the negotiating history; (3) a factual finding regarding evidence of dissatisfaction; and (4) consideration of employee preference. The decision clearly indicates that the majority believes the balance in this case was tipped in favor of granting the petition. This "totality of circumstances" approach is the same approach used by the hearing officer and the dissent, albeit with a different result.

The dissent's claim that one particular statutory criterion in Section 3545(a) is heightened by the majority evinces a failure to understand the majority opinion and PERB precedent. The dissent does not acknowledge the role of the first three factors listed above in reaching the majority's decision in this matter, only the fourth. As to the fourth, employee

preference, the dissent ignores the "choice" language contained in EERA. (See EERA secs. 3540 and 3543(a).) Significantly, the dissent also ignores the fact that this was such a close case that the hearing officer chose to use the negotiating history factor to "tip the scale" in favor of denying the petition. Choice is a legitimate factor for consideration. Contrary to the dissenting member's belief, it was not the only factor weighed by the majority.

ORDER

For the reasons set forth above, the unit modification petition is hereby GRANTED. It is hereby ORDERED that the San Diego Community College District's continuing education counselors be transferred to the San Diego Community College District's college faculty unit.

The Board DENIES the requested remedy that the continuing education counselors be placed upon the salary schedule applicable to counselors currently represented by the American Federation of Teachers Guild, Local 1931.

Member Whitehead joined in this Decision.

Member Amador's dissent begins on page 17.

AMADOR, Member, dissenting: The Public Employment Relations Board (PERB or Board) hearing officer's dismissal of the unit modification petition should be affirmed. Although I agree with the majority opinion's statement of the applicable law, I apply a more traditional analysis and refrain from elevating a single factor without a legal basis. This approach leads me to conclude that the hearing officer did not commit prejudicial error when she found that the existing unit configuration reflects two appropriate units, and the parties have not demonstrated a compelling reason to disrupt those units.

As the majority opinion correctly states, the standard against which the requested unit modification petition is judged is whether the proposed unit is an appropriate unit. (Long Beach Community College District (1999) PERB Decision No. 1315.) The Board is not compelled to ascertain whether the proposed unit is the most appropriate unit.

As the majority opinion also notes, the Board must determine the appropriateness of a unit by weighing and balancing designated statutory criteria in order to achieve consistency of application and the general objectives of the Educational Employment Relations Act (EERA). (Antioch Unified School District (1977) EERB Decision No. 37[1] (Antioch) at p. 3, citing EERA sections 3545 and 3540.) However, the legislature did not state how each of the enumerated criteria should be weighed in respect to the others. (Id.)

After considering the statutory factors in accordance with longstanding PERB precedent, the hearing officer decided that the addition of continuing education counselors to

[1] Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

the college faculty unit would not create an appropriate unit in light of the criteria listed in EERA section 3545(a).[2]

The majority opinion would reverse this determination by recasting the analysis to place a heavier emphasis on the desire of the employees. Although the majority acknowledges that PERB eschews use of a checklist approach and "instead considers the totality of circumstances," it appears to introduce a new test to be applied. As I read the majority opinion, instead of determining whether the petitioned for unit is "an appropriate unit," the majority suggests that, where neither unit is inappropriate for the continuing education counselors, the desire of the employees should govern. To elevate a particular factor over the other statutory criteria runs counter to PERB precedent. (Antioch.) Although there are occasions when it is appropriate to modify precedent, in my opinion, this should only occur when it is supported by a firm legal foundation. Otherwise, deviation from precedent can appear to be the work of a biased or "activist" Board panel whose goal is to achieve a policy objective.

The majority's new emphasis on a single factor undoubtedly reflects good intentions, but my review of PERB precedent does not support according additional weight to this one factor in the unit determination analysis. As a matter of appellate review, I find that the

[2] Section 3545 provides, in pertinent part:

> (a) In each case where the appropriateness of the unit is an issue, the board shall decide the question on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district.

hearing officer's balancing of the statutory criteria amply justifies her conclusion that the two types of counselors possess more significant differences than similarities. Furthermore, the parties have presented no compelling reason to disrupt the current appropriate units. Absent a showing of prejudicial error in the hearing officer's analysis, there is no need for the Board to substitute its judgment for that of the hearing officer. I would affirm the hearing officer's decision.